***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

471

# BRIEF FOR APPELLANT

# AND

# JOINT APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23298

ROBERT GRAHAM, Et Al.

Appellants

vs.

DISTRICT OF COLUMBIA,

Appellee

Appeal from the United States District Court
for the District of Columbia.

United States Court of Appeals
for the District of Columbia

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Nathan J. Paulsen
CLERK

CLEMENT THEODORE COOPER
918 F Street, N.W.
Suite 300-302
Washington, D.C. 20004

Attorney for Appellants

UNITED STATES COURT OF APPEALS

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CERTIFICATE OF SERVICE

Copy of the foregoing Brief, mailed, postage prepaid to Corporation Counsel's Office, District Building, 14th & E Streets, N.W., Washington, D.C. 20004, this _____ day of _____, 1969.

s/ Clement Theodore Cooper

Clement Theodore Cooper
Attorney for Appellants
918 F Street, N.W. (300-302)
Washington, D.C. 20004

## QUESTIONS PRESENTED

1. WHETHER A MUNICIPALITY IS IMMUNE FOR CIVIL LIABILITY UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY ?

2. WHETHER FEDERAL COURTS HAVE THE POWER TO ABOLISH THE STATUTORY CONCEPT OF GOVERNMENTAL IMMUNITY WITHOUT DOING VIOLENCE TO THE DOCTRINE OF SEPARATION OF POWERS ?

3. WHETHER THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S SUIT WAS BARRED UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY ?

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CONSTITUTIONAL PROVISIONS :

Amendment V, U.S. Constitution Provides :

No person shall be held to answer for a capital, or otherwise infamous crime..... nor be deprived of life, liberty, or property, without due process of law ; nor shall private property be taken for public use, without just compensation. ..... 13

Amendment XIV, U.S. Constitution provides :

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ; nor shall any State deprive any person of life, liberty, or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws.....13

STATUTES INVOLVED :

1 D. C. Code 902 ( a ) ( 1967 Edit. ) provides :

The Commissioners of the District of Columbia are empowered to settle, in their discretion, claims and suits, either at law or in equity, against the District of Columbia whenever the cause of action .....

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( a ) Arises out of the negligence or wrongful act, either of commission or omission, of any officer or employee of the District of Columbia for whose negligence or acts the District of Columbia, if a private individual, would be liable prima facie to respond in damages, irrespective of whether such negligence occurred or such acts were done in the performance of a municipal or a governmental function of said District : Provided however, That nothing herein contained shall be construed as depriving the District of Columbia of any defense it may have to any suits, either at law or in equity, which may be instituted against it or give any person, corporation, partnership, or association any right to institute any suit against the District of Columbia which did not exist prior to June 5, 1930 ..... 7

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UNITED STATES COURT OF APPEALS

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# BRIEF FOR APPELLANTS

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## JURISDICTIONAL STATEMENT

The Jurisdiction of this Honorable Court is invoked by virtue of 28 U.S.C. 2106 ( 1964 ) pursuant to its authority to affirm, modify, vacate, set aside or reverse any judgement, decree, or order of Court lawfully brought before it for review and may reward the cause and direct the entry of such appropriate judgement, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

## STATEMENT OF THE CASE

On April 11, 1965 appellant, Robert Graham was arrested for drunkness while walking home at or near 9th Street and Maryland Avenue, Northeast. Appellant was thereupon taken to Number 9 Precinct and was placed in a crowded cell with six other prisoners. Approximately 5:00 P.M., appellant's wife, Susie Graham, went to Number 9 Precinct and posted $10.00 collateral and returned home. Sometime between the period of appellant's arrest and the time at which appellant's wife posted collateral, appellant was severely and brutally attacked by one of the prisoners in the cell. Appellant had done nothing to precipate or motivate the attack. Appellant yelled on numerous times but none of the officers in the precinct responded. Neither did any of the prisoners in the cell attempt to prevent further attack on appellant. Appellant, thereupon being rendered in a semi-unconscious state, was, again attacked brutally and viciously by the same prisoner again. Appellant was again thrown to the floor and during the attack his right ear lobe was bitten completely off and was kicked and pounced upon repeatedly and savagely, thereby causing multiple fractures of his 7th, 8th, and 9th ribs on the right side ; multiple contusions and abrasions and contusions of the kidney. Again, during the attack, appellant yelled for help but none of the police officers in the precinct responded.

Finally, after some several hours delay, from the time at which appellants wife had posted collateral, appellant was taken from the cell to be released and upon being taken to the desk at the precinct, it was then that the officers took note that appellant had been savagely and brutally attacked. Appellant was then taken to D.C. General Hospital in a police wagon, given emergency treatment

and then transported back to Number 9 precinct where appellant was finally released at about 3:00 A. M. the following morning. Notably, in spite of the numerous bodily injuries which appellant had received, he was not admitted as a patient at D. C. General Hospital. After appellant had returned home his wife telephoned D. C. General Hospital requesting that appellant be admitted but admission was refused. The following day, appellant had contacted Pneumonia along with the aforementioned injuries and was admitted at Freedmons Hospital.

Appellant forwarded the required Statutory notices to the District of Columbia Commissioners notifying them of his claim for damages. ( J. A. 1 ). The claim was refused. A Civil Suit was filed in the U. S. District Court seeking damages ( J. A. 2 ). The cause came on for Trial and as a Pre-Trial Motion. Appellee contended that appellant's suit was barred under the Doctrine of Governmental Immunity. After hearing pre-trial arguments on the Motion, the Trial Court ruled that the appellee, District of Columbia was not liable and was immune from suit by virtue of the Governmental Immunity Doctrine and for the further reason that operation of a police Department was a governmental function and appellants suit did not fall within any of the exceptions to the Governmental Immunity Doctrine. ( J. A. 3 ). On June 23, 1969 there was entered on the docket of the U. S. District Court an order dismissing appellants Complaint. It is from that order or judgement that appellants filed notice of appeal to this Honorable Court ( J. A. 4 ).

## STATEMENT OF POINTS

I. A municipality is not immune from civil liability under the Doctrine of Governmental Immunity. The Doctrine of Governmental Immunity, as invoked in 1969, is a time-worn archaic doctrine and represents a revisitation of part history, which has no legal, economical, social, political or pragmatic value.

While it has been enunciated that the operation of a police department is a governmental function, the operation of a police department, involving training, instruction, supervision and control of police officers, is a ministerial function of a municipal government and as such the District of Columbia would be liable in tort notwithstanding the invokement of the Immunity defense.

The Governmental Immunity Doctrine clothed in disguise of a Federal Statute applicable to the District of Columbia, is unconstitutional as a denial of due process of law and a denial of equal protection of Laws for the reason that persons having meritorious claims against a municipality are barred under the distinction of Governmental and Proprietary functions of a municipality. Obviously, the distinction discriminates against one class as opposed to another class of persons having claims against the municipality. The distinction, as heretofore made, has no real legal on Constitutional justification or efficacy.

II. Federal Courts possess the power to abolish the Statutory concept of Governmental Immunity without doing violence to the Doctrine of Separation of powers. This Honorable Court holding in Urow v. District of Columbia 114 U.S. App. D.C. 350, 316 F. 2d, 351, Cert. denied 375 U.S. 826 ( 1963 ). Should be re-examined. Flexibility in interpretating the existing exceptions to the Governmental Immunity Doctrine does not obviate the power of the judiciary to completely abolish the Doctrine and a Federal Statute which encompasses

that doctrine particularily where liberal and flexible interpretations will eventually destroy the doctrine in toto in any event.

While the preferred and enlightened Government is one which operates under a system of Separation of powers and checks and balances, our system of Government require that Federal Courts on occasion interpret the Constitution in a manner at viarance with the construction given the documents by another branch. The alleged conflict that such an adjudication may cause cannot justify the Court's avoiding their constitutional responsibility. Strict interpretation of the doctrine of separation of powers ignores the acceptable and realistic doctrine that none of the three departments of government is subordinate but that all are co-ordinate, independant, co-equal and potenially co-extensive. A complete separation of powers is not desirable nor was it ever intended by the framers of the Constitution. The powers may be blended and consequently the Judiciary is obliged to act where Congress has remained silent in the face of pressing needs for change.

I I I. The trial Court erred in ruling that the Appellant's claim was barred under the doctrine of Government Immunity.

## A R G U M E N T

### ( I ) ( a )

### A MUNICIPALITY IS NOT IMMUNE FROM CIVIL LIABILITY UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY.

a. Historical Origin :

The doctrine of Governmental Immunity or Sovereign Immunity as it is known, began with the theory that, under the early common Law, Kings and Royalty derived devine rights from God and as such could do no wrong. To

allow the king to be sued would be repugnant and contradictary to the Sovereignty of the King. W. Prosser, the Law of Torts #125, at 996-97 ( 3d. ed. 1964 ). The doctrine was first applied to a municipality in 1798 in Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Rep. 359 ( 1798 ). The decision in Russell v. Men of Devon, supra, ( protecting the municipality from Suit was predicated upon the absence of funds in the Devon Treasury to pay judgements arising out of tort claims, as well as the fear of a multitude of similar suits. Greenstone, Liability of Police Officers for Misuse of their Weapons, 16 Cleve-Mar L. Rev. 397, 398 ( 1967 ). The doctrine of Governmental Immunity as viewed in 1969 is considered to rest upon three grounds : ( 1 ) That the immunity of the Sovereign from suit , which is extended to the municipality as the representative of the Sovereign ; ( 2 ) the theory that it is more expedient that scattered individuals suffer than that the public in general, as represented by the government be inconvenienced ; and ( 3 ) the theory that governmental agents will perform their duties more effectively, if not hampered by fear of tort liability. Annot, 60 A. L. R. 2d. 1198, 1199 ( 1958 ). Needless to say, the doctrine of Governmental Immunity has been brought under sharp attack in recent years. Awareness and realization of these attacks invites a careful and demanding search for the real constitutional justification for the doctrine, exceptions to the doctrine notwithstanding.

B. Effect of the Doctrine of Governmental Immunity :

The appellant was arrested on April 11, 1965 for drunkness and was taken to Number 9 Precinct. While being confined in a crowded cell with several other prisoners, appellant was viciously and savagely attacked by one of the prisoners. During the attacks, appellant screamed for help but no one came to Appellant's rescue. Appellant sustained severe multiple bodily injuries of permanent duration.

Appellant filed this action in the United States District Court under 1 D.C. Code 902, 1961 Edition which provides :

" The Commissioners of the District of Columbia are empowered to settle, in their discretion, claims and suits, either at Law or in Equity, against the District of Columbia wherever the cause of action.....

a. Arises out of the negligence or wrongful act, either of Commission or omission of any officer or employee of the District of Columbia whose negligence or acts the the District of Columbia if a private individual would be prima facie to respond to damages, irrespective of whe- the such negligence occurred or such acts were done in the performance of a municipal or governmental function of said District. Provided however, that nothing herein contained shall be construed as depriving the District of Columbia of any defense it may have to any suit, either at law or in equity, which may be instituted against it or to give any person, corporation, partnership, or association any right to institute any suit against the District of Columbia which did not exist prior to June 5, 1930. "

Section 902 of the D.C. Code makes it clear that the Commissioners are empowered to settle claims, in their descretion against the District of Columbia whether the negligent acts were done in the performance of a municipal or governmental functions. It would appear then that Congress, through innuendo has not made it mandatory and explicilty clear that the doctrine of Governmental Immunity must be asserted or can be asserted under Section 902 which states that the foregoing provision of Section 902 shall not be construed as depriving the District of Columbia of any defense it may have to any suit either in Law or Equity. Appellant reads the Statute to mean " nothing in Section 902 shall be construed as depriving the District of Columbia of any defense it may have to any suit in law or equity, other than the defense of governmental immunity which Congress has waived within the four corners of Section 902.

Congress has legislated twice on the general subject of the liability of the District of Columbia to Civil Suits. In 1929, 1 D.C. Code 902 to 905, granted to the Commission the power to settle, without suit, certain types of claims. See Adams v. D.C. Mon, App. D.C. 122 A 2d 765 ( 1956 ). Again in 1933 Congress merely entered a requirement that notice of all claims against the District be filed with the Commissioner within six months from the date the injury is sustained. However, Congress has never, hic verba, met the problem head-on by specifically declaring that the defense of governmental immunity is waived. A groping in legislative jungle is evident.

Amidst the confusion surrounding the defense of governmental immunity and the Courts attempt to find the means through which the doctrine could be avoided, the classic yet unclarified distinction has been made and the exception has evolved that the District of Columbia may be held liable if in the performance of a proprietary or corporate function rather than a governmental function. Calomeris v. D.C. 96 U.S. App. D.C. 364, 226 F 2d 266 ( 1955 ). The rule in this jurisdiction has been consistently enunciated that torts committed by officers and employees of the District of Columbia, in the exercise of governmental functions such as the operation of a police force cannot be made the basis of liability in a suit against the District. Capital Transit Company v. D. of C., 96 U.S. App. D.C. 699, 225 F. 2d 38 ( 1955 ). This Honorable Court has seen fit to establish exceptions to the immunity Doctrine in Elgin v. D.C., 119 U.S. App. D.C. 116, 337 F. 2d 152 ( 1964 ). Urow v. D. of C., 114 U.S. App. D.C. 350, 316 F. 2d 351 Cert. denied, 375 U.S. 826 (1963 ). Harbin v. D. of C., 119 U.S. App. D.C. 31, 336 F. 2d 950 ( 1964 ). In spite of the distinctions between corporate and proprietary functions as opposed to governmental functions, the method, the logic, the reasons de etre and basis for such a distinction remains unclear to this day.

The U.S. Supreme Court was quick to note that,

> " there is no topic of the law in respect of which the decisions of the State Courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations..... No definite rule can be extracted from the decisions". See Brush v. C.I.R., 300 U.S. 352, 362, 57 S. Ct. 495, 496-497, 81 L. Ed. 691 ( 1937 ).

The case before the Bar of this Honorable Court is clearly one which involves the operation of the Police Department and whether the District of Columbia can be held liable for torts committed during the operation of that department. It has been held in this Jurisdiction that operation of a police force ( department ) is a governmental function. Adams, supra. The question then is whether the operation of the force, including training, instruction, supervision and control of police officers is a discretionary or a ministeral function of a municipal government. Appellant contends that the operation of a police department is a ministeral function of a municipal Corporation. This Honorable Court did define and make the distinction in Elgin, supra. This Court partificated in Elgin, supra, that an act is ministorial if it connotes the execution of policy as distinct from its forwardation. It is discretionary if it involves the exercise of Judgement and the formulation of policy, that is, the " power and duty to make a choice among valid alternatives. " See Jaffe Suits against Governments and Officers, Damage Actions, 77 Harv. L. Rev. 209, 218 ( 1963 ). Inasmuch as Congress has failed to act in abolishing the Governmental Immunity Doctrine, the distinction set forth in Elgin, supra, must be followed here. Thus the exception to the immunity doctrine would be and is that the District of Columbia may be answerable in Tort for the negligence in the operation of that Department inasmuch as the operation of that Department is a ministerial act rather than discretionary. Tucker v. Duke, 107 U.S. App. D/C. 253, 254, 276, F. 2d 479, 500 ( 1960 ). See also Greenstone, Liability of Police Officer for

their Weapons, 16 Cleve-Mar. L. Rev. 397, 408-09 ( 1967 ). The Appellant herein had been arrested and was being held in confinement in a local precinct, in an overcrowed cell, where he was viciously attacked by another inmate without just cause or provocation. Appellant yelled repeatedly for help but none of the officers assigned on duty would respond. As a result appellant sustained loss of an ear lobe and several fractured ribs along with other multiple internal bodily injuries. The District of Columbia is clearly negligent in failing to prevent overcrowding of cells ; failing to patrol and police the cell blocks ; and retaining the appellant in the cell block long after appellant's wife had posted collateral for his release. When the negligence of the municipality in the performance of ministerial functions ( such as the operation of the police department ) is the proximate cause of injury to a person that municipality is not immune from suit and will be held liable in tort.

c. Present Status of the Immunity Doctrine.

At first blush, Appellant advocates the complete abolition of the Doctrine of Governmental Immunity. Congress having failed to act, the burden is on the Judiciary to abolish the Immunity doctrine which is " an absolescent and dying doctrine." Calomeris, supra. Termination of the doctrine is not necessarily the burden of the legislature as this Honorable Court reasoned in Urow, supra. Courts are not at liberty to overlook or disregard the commands of our Federal Constitution nor can the Courts countenance evasions of the Constitution. Williams v. Louisana, 103 U.S. 637, 26 L. Ed. 595 ( 1871 ) ; Dartmouth College v. Woodward 4, Wheat ( US ) 518, 4 L. Ed. 629 ( 1819 ). As Chief Justice Marshall said, whenever a Statute is in violation of the fundamental law, the Courts must so adjudge and thereby give effect to the Constitution. Marbury v. Madison, 1 Cranch ( US ) 637, 2 L. Ed. 60 ( 1803 ). This H norable Court has long since acknowledged its duty to act when it stated that :

" The necessities of the American system requires the Judiciary to determine the Constitutionality of acts of the legislative, and this represents the highest exercise of Judical power and one that even the Judiciary is reluctant to exercise. Panitz v. D. of C., 72 App. D.C. 131, 112 F. 2d 39 ( 1940.

It is indeed not enough to say that the abolition of the Doctrine of Immunity is a burden to be undertaken by Congress. Obviously, Congress may never act in this area. Yet, it is apparent that the doctrine has been brought under sharp attack by other courts. An intensive abolition of the doctrine began in 1957 when the Florida Supreme Court held that a municipality was not immune from liability in a tort resulting from the negligence of a police officer. Hargrove v. Cocoa Beach 96 So 2d 130 )( Fla. 1957 ). See also Borchard, Government Liability In Tort 34 Yale L. J. 1, 129, 229 ( 1924-25 ) ; Fuller and Casner, municipal Tort Liability in Operations, 54 Harv. L. Rev. 437 (1941 ). Price and Smith, Municipal Tort Liability ; A continuing Enigma, 6 U. Fla L. Rev. 330 ( 1953 ) ; Smith, Municipal Tort Liability, 48 Mich. L. Rev. 41 ( 1949 ) ; Tooke, The Extension of Municipal Liability in Tort, 19 Va. L. Rev. 97 ( 1932 ). After Hargrove, supra, came a rash of decisions holding municipailities answerable in Tort and rejecting the Doctrine of Governmental Immunity. The Supreme Court of Illinois rejected the immunity doctrine in Mulitor v. Kanelanci Comm. School Dist No. 302, 18 Ill. 2d 11. 163 N. E. 2d 89 ( 1959 ). New Jersey rejected the doctrine in McAndrew v. Mularchuk, 33 N. J. 172, 162, A 2d 820 ( 1960 ). California rejected the doctrine in Muskopf v. Corning Hosp. Dist. 55, Cal, 2d 211, 359 p. 2d, 457 ( 1961 ) ; Michigan rejected the doctrine in Williams v. City of Detroit, 364 Mich. 231, 111 N. W. 2d ( 1961 ). Wisconsin in Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N. W. 2d 618 ( 1962 ) Minnesota in Spaniel v. Moonels View SchoolDist. No. 621, 264 Minn. 279, 118 N. W. 2d 795 ( 1962 ). Arizona in Stone v. Arizona Highway Comm.

93 Ariz. 384, 381 p. 2d 107 ( 1963 ). Kentucky likewise rejected the doctrine in Haney v. City of Lexington, 386, S.W. 2d 783 ( Ky 1964 ). Notably, rejection of the doctrine was by judicial declaration and not by act of the various state Legislatures.

Section 902, D.C. Code, Title 1 reserves any defenses which the District may have to any action in Law or in Equity. Historically, the defense of Governmental Immunity first appeared at Common Law in Russell v. Men of Devon, supra. State Courts, in abolishing the doctrine reason that they are not bound to follow the Common Law Rule of Immunity arising after the adoption of the American Declaration of Independence. Hargrove v. Cocoa Beach, supra. The historical significance has no bearing to the Judicial approach which might be used in deciding cases which affect the District of Columbia Law. The District of Columbia while a municipality is in fact a Federal District and is therefore controlled and governed by Federal Law. There is no Federal Common Law. Quaerre, whether the Common Law defense of Govermental Immunity is really one to be reckoned with here in light of 1 D.C. Code 902 which makes no specific mention of Immunity as a defense to suits at law or equity. Congress could have spelled out the defenses in Section 902 which were available to the District of Columbia but it chose not to do so. Section 902 is barren for want of specificity of defenses.

Courts often feel compelled to abide by the Doctrine of Stare Decisis. However, Stare Decisis is nothing more than a self-stultifying felish. There must be clean breaking away from the doctrine and the practice where adherence thereto bars or prevents injured persons from seeking relief from governments.

Accordingly, the District of Columbia is not immune from Liability under the Doctrine of Governmental Immunity and a sweeping abolition of the doctrine is warranted.

( II )

## THE GOVERNMENTAL IMMUNITY DOCTRINE AND A STATUTE WHICH ENUNCIATES SUCH A DOCTRINE IS UNCONSTITUTIONAL FOR IT DENIES EQUAL PROTECTION OF LAWS AND IS A DENIAL OF DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION

The Constitutional provisions involved are as follows :

The Fifth Amendment of the Federal Constitution provides :

> " No person shall ..... , nor be deprived of life, liberty, or property, without due process of law. "

The Fifth Amendment rather than the 14th Amendment is applicable to the District of Columbia. Barry v. Hall, 98 F 2d 222, 68 App. D.C. 350 ( 1938 ); O'Conner v. District of Columbia, 153 F 2d 225, 80 U.S. App. D.C. 351 ( 1946).

### Section I

The 14th Amendment while not applicable to the District of Columbia provides that :

> "..... nor shall any State deprive any person of life, liberty, or property without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws. "

This Court has ruled the due process provision of the 5th Amendment as applied to the District of Columbia implies equal protection of the laws. Hamilton Nat. Bank of Wash. v. Dist. of Col., 176 F 2d 624, 85 U.S. App. D.C. 109, Cert. denied 70 S. Ct. 241 ( 2 mems.) 338 U.S. 891, 94 L. Ed. 547 ( 1949 ). This Honorable Court further ruled, many years prior to its ruling in Hamilton, supra, that life, liberty and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as those residing in the several states. Lappin v. Dist. of Col., 22 App. UC 76 ( 1903 ) ; See also, Groot v. Reilly, 266 F 1008, 49 App. D.C. 388 ( 1919 ) ; Wilson v, McDonnell 265 F 432, 49 App. D.C. 280 ( 1919 ).

The contention which Appellant raises here is that the Governmental Immunity Doctrine and 1 D C. Code 902 which enunciates and harbors such a doctrine is Unconstitutional for the reasons that the Statute which allows assertion of the defense of governmental immunity denies equal protection of the laws and is a denial of Due Process of Law. But, let us first examine Section 902, inorder to ascertain whether the defense of governmental Immunity is specified within the clear language of the Statute. While Section 902 gives the District Commissioners authority, in their discretion, to settle claims and suits irrespective of whether the negligence furnishes the basis of such claims or suit were done in the performance of a municipal or governmental function. Section 902 further states that nothing contained in 902 shall be construed as depriving the District of Columbia of any defense which it may have to any suit in law or in equity. 1 DC Code 902.

While admittedly, the governmental immunity doctrine is a creature of the Common Law, State Statutes have codified the doctrine in their respective laws unlike the District Code, wherein Congress has not, hic verba, spelled out the doctrine in Section 902. There is a split of opinion as to when the Doctrine first arose. For our purposes here, however, Appellant adopts the view that the defense of Immunity first arose with the 1788 English case of Russell v. Men of Devon, supra. The rule is that the Common Law is generally considered to be that body of Law in force in England prior to the American Declaration of Independence, 1776. Most American Courts do not consider themselves bound by common law priniciple arising after 1776. The Florida Supreme Court took the view that the immunity rule arose in 1788 and thus, an act of the State Legislature is not needed inorder to abrogate or abolish the common Law rule. See Hargrove v. Cocoa Beach, 96 So. 2d 130 ( Fla. 1957 ). The same rationale is applicable to the District of Columbia as it now enjoys the Statutes of a municipality for the purposes. The reason being

that the District may sue and be sued. Historically, the territory which we now call the District of Columbia was ceded to the Federal Government by the State of Maryland under Act Md. Dec. 19, 1791 and Act of Virginia Dec. 3, 1789. As such the common law of Maryland and Virginia became the so called Common Law of the District of Columbia. Consequently, urging adoption of the rationale in Hargrove, supra this Honorable Court is indeed empowered to abolish the governmental Immunity doctrine since it is a creature of the common Law and first arose after the Declaration of Independence in 1776. What this Court said in Urow v. District of Columbia, supra, that the general abolition of the doctrine of Sovereign immunity is not something to be undertaken by the Judiciary, it should be re-examined again in light of Appellant contentions. Urow v. D. of C. 114 U.S. App. D.C. 316 F. 2d 351 ) ( 1963 ). This Court does not lack the power to abolish a general priniciple of common Law which had its origin after the Declaration of Independence in 1776. To continue recognition of the sovereign immunity defense to all suits at law and in equity is a denial of Due Process of Law under the Federal Constitution.

It cannot be disputed that the judicially created and recognized exceptions to the Immunity Doctrine is conflicting with the mandates of equal protection of laws implication under the 5th Amendment of the Federal Constitution. This Honorable Court has made the distinction that the District of Columbia is liable for negligence in discharging duties of a corporate or proprietary character, ( Adamns v. D. of C., 122 A 2d 765 ( 1956 ).)( Mun. App. D.C. 1956 ); Tillman v. Dist. of Col. 58 App. D.C. 242, 29 F 2d 442 ( 1929 ); Calomeris, supra ; D. of C. v. Green 96 App. D.C. 20, 223 F 2d 312 ( 1955 ); Dist. of Col. v. Richards, 75 U.S. App. D.C. 349, 128 F 2d 297 ( 1942 ); Scull v. Dist. of Col. 102 U.S. App. 104, 250 F 2d 767, Cert. denied 78 S. Ct. 703, 356 U.S. 920, 2 L. Ed 2d 715 ( 1958 ); Johnston v. D. of C. 6 S. Ct. 923, 118 U.S. 19, ( 1886 ). On the

other hand, the Court has ruled more than once that no cause of action may be maintained against the District of Columbia for Torts or negligence of its officers and employees in the performance of a governmental functions. Dist. of Col. v. May, 63 App. D.C. 10, 68 F 2d 755 (1934)Cert. denied 54 S. Ct. 641, 292 U.S. 630 ; Urow v. Dist. of Col., supra ; Sass v. Dist. of Col. 114 U S. App. D.C. 365, 316 F 2d 366 (1963) ; Capital Transit Co. v. Dist. of Col., supra ; Dist of Col. v. Totten, supra ; Jones v. Dist. of Col. 51 App. D.C. 319, 279 F 188 (1922) ; Calomeris, vs. D. of C., supra. Yet, the real and logical reason for the distinction between functions which are proprietors or corporate and functions which are governmental in nature. This Court was quick to recognize the failing logic in the distinction. Approximately one year after the Court decided Urow, supra (1963), Elgin v. Dist. of Col. was brought before the Court for review. This Court ruled in Elgin, that the proprietary-governmental dichotomy of Capital Transit, supra no longer constitutes the complete test in determining whether, in a given case, the District of Columbia is immune from suit. This Court said then that:

> " A finding that a function is governmental is the beginning of inquiry into the issue of answerability in tort, not the end of it. "

See Elgin v. Dist. of Col. 119, U.S. App. 116, 337, F 2d 152 (1964) This being law then, it must be strongly contended that the governmental immunity doctrine is no longer regarded as fundamental law. See 34, Yale L.J. 229, 240 ; 42 Yale Law J. 241 ; 16 Cornell Law Quarterly ; 19 Virginia Law Rev. 97.

The distinction between acts which are governmental in nature and acts which are proprietary in nature sets up a class distinction between party litiguist and invidiously discriminates against and litigates class as opposed to the other.

Suits falling under factual paterns where performance of governmental functions are prohibited while suits falling under factual paterns where performance of corporate function are permitted. In both case fact paterns, the claimants have sustained physical and property damage. One group is allowed to recover against the District of Columbia while the other group is denied recovery. The distinction or classification is clearly fanciful, capricious, arbitrary, unnatural and illogical and must therefore be completely abolished under the powers granted the Judiciary. The rule is well settled in this jurisdiction that Congress has the same police powers in the District as the State legislature have within their several jurisdictions. Lansburgh v. District of Columbia, 11 App. D.C. 512 ( 1897 ) ; Beach v. Dist. of Col. 116 U.S. App. D.C. 68, 320 F 2d. 790 ( 1963 ), Cert. denied 84 S. Ct. 351, 375 U.S. 943. Admittedly, when the District of Columbia acts in its governmental capacity, it exerts its police power. That power is to be used for the common welfare, impartially and without discrimination. This a Statute which is discriminatory either directly or indirectly is unconstitutional. Francis v. Fitzpatrick, 129 Conn. 619, 30 A. 2d 552 ( 1943 ) ; New Orleans v. Le Blanc, 139 La 113, 71 So. 248 (1915) The invokement of the governmental immunity doctrine prevents a party litigant from seeking judical redress or if redress is sought it prevents a party litigant from obtaining a fair hearing to say the least.

Implied in the 5th Amendment of the Federal Constitution is the Equal protection Clause found in the 14th Amendment. Hamilton Nat. Bank of Wash. v. Dist. of Col., supra. The inhibitions against denial of equal protection of the laws means that no agency, legislative, executive or judicial, no person, officer or agent exerting the power of the State shall deny equal protection to any person within the jurisdiction of the State. Virginia v. Rives, 100 U S. 313, 318 ( 1880 ). The equal protection clause implies that access to the Courts of the Country for protection of

their persons and property and the preventions and redress of wrongs. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Barbier v. Connolly, 113 U.S. 27, 31 (1885). Appellant does not deny that Congress has the power to engage in legislature classifications. What Appellant does contend is that where the classification or distinction has no real rational or reasonable basis, then the Statute is unconstitutional. Watson v. Maryland, 218 U.S. 173 (1910). A classification preceding the exercise of the right to sue a municipal corporation cannot be based upon the distinction between corporate and municipal functions when there is no real explanation for the distinction. The Judgement entered by the trial court that Appellant's suit was barred from seeking redress against the District of Columbia based upon the common law concept of Governmental immunity couched within the frame work of Section 902, D.C. Code was error.

If the Constitutional considerations raised here do not compel the Court to strike the doctrine of governmental immunity as unconstitutional, there is another avenue through which the Court can arrive at a similar result. Cases in other jurisdictions, have ruled that the task of maintaining a police department, supervising and instructing it's officers are ministeral and not discretionary acts. See Muskopf v. Corning Hospital District, 55 Cal. 2d 211, 359 P. 2d 457 (1961); Hargrove v. Town of Cocoa Beach, supra. The activities of a police Department are such that they do not involve the kind of policy formulating, judgement-making processes encompassed by the term "discretionary". Once the decisions have been made to establish a police department and to organize it in a particular way and to have specific individuals to be members of that department, the acts of training, instructing, supervising and controlling the individual officers are merely " ministeral".

The rule evolves, then, that when the negligence of the municipality in the performance of these ministeral functions is the proximate cause of the injury to a citizen, the municipality is not immune from suit and will be held liable in Tort. ( 1. ) A survey of rulings by our own District Court on the question of Governmental Immunity evidences clear conflicting nations as to what the law of the District of Columbia is or should be regarding governmental Immunity. Thus, Appellant strongly urges this Honorable Court to finalize a clear and concise ruling on the question of Governmental Immunity.

In the case now before the Court for review, Appellant sustained multiple and severe bodily injuries sustained while in the custody of the police Department. The District of Columbia must not be heard to complain that it is not liable for the reason that operation of a police department is a governmental function and it is therefore immune from suit.

( III. )

## FEDERAL COURTS POSSES THE POWER TO ABOLISH THE STATUTORY CONCEPT OF GOVERNMENTAL IMMUNITY WITHOUT DOING VIOLENCE TO THE DOCTRINE OF SEPARATION OF POWERS

Appellant has argued herein before, in brief that when the State of Maryland and Commonwealth of Virginia ceded territory to the Federal Government and the Federal City was established, the common laws of

( 1.) See opinion of Trial Court, dated Dec. 12, 1968. Thomas v. D. C. et al. C. A. No. 1370-68, pp. 12 CF Greenstone, Liability of Police Officers for Misuse of their Weapons, 16 Cleve-Mar. L. Rev. 397, 408-09 ( 1967 ).

Maryland and Virginia became a part of the laws of the District of Columbia. The immunity doctrine having been first established in Russel v. Men of Devon, supra, which was decided some 12 years after the signing of the declaration of Independence, (2.) strong questions are reused as to whether or not the Governmental Immunity doctrine represents in fact, a common law defense. In short, Appellant contends here that the defense of Sovereign Immunity which has been asserted by the District of Columbia, has been erroneously sanctioned all of these years. The Common Law cannot and should not take priority over our Declaration of Independence, supra and our Federal Constitution. The common law reference to is generally considered to be that body of law in force in England prior to the signing of the American Declaration of Independence, supra. Hargrove v. Cocoa Beach, supra; Greenspan v. Slate, 12 N.J., 426, 97 A 2d. 390 (1953); Loudon v. Loudon, 114 N.J. Eq. 242, 163 ATL. 840 (1933); Cawker v. Dreutzer, 197 Wisc. 98, 221, N.W. 401 (1928). Even assuming that Congress has incorporated the Common Law in Statutes peculiar to the District of Columbia, it is overwhelmingly clear that the Judiciary determines both the content and the meaning of the common law. A fortiori this Court should compare and examine the history and rationale in Russell v. Men of Devon, supra, in light of custom, habits

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(2.) U.S.C.A. Const. Art. I # 1-8, CL. 3.

and conditions of our society in 1969. Hence the Courts in this Jurisdiction are not bound by the so-called Common Law as it relates to the District of Columbia. It could be that from a historically scholastic point of view, no matter how painful the thought may be, Courts have labored erroneously over the concept of the Common law defense of Sovereign immunity. As Appellant has contended before, the signing of the American Declaration of Independence, supra, in 1776, abolished the original Colonies from allegiance to the British Crown and all political connections between the United Colonies, of which Maryland and Virginia were a part, were likewise totally dissolved. If Courts are to recognize the fact that prior to 1776, repeated injuries and usurpation were objects of exercise. In absolute Tyranny over the United Colonies; That the King of Great Britain had refused to pass other laws for the accommodation of large districts of people ; refused to assent to Laws for establishing Judiciary Powers ; had refused to assent to Laws, the most wholesome and necessary for the public's good. How then can the view be consistently adopted that the common law of England found it's way into the laws as they affect the District of Columbia. To incorporate the common law, for these purposes here, into the District Law smacks of fundamental inconsistencies in a legislature and Judicial vein.

Under Article III, Section I of the Federal Constitution, " the Judicial Powers of the United States is vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". The exclusive power vested in the Judiciary is that of interpreting the laws. Thus, a question as to whether or not the

Courts can abolish the Sovereign immunity doctrine, considering it's scope, effect, purpose and intent, is a question, not for the Congress as this Court said in Urow, supra . Rather, it is solely and exclusively a question of law is peculiarly appropriate for independent Judicial ascertainment. Dunat v. Hurney, 297 F. 2d 744 ( C.A. Pa. 1961 ). Congress vested the Court with the power to interpret laws. Obviously the Courts cannot legislate. But Judicial abolition of a Common Law principle which is conflicting with the general organic laws of the United States is not an act of legislating but constitutes an act of Judical exercise of exclusive powers. Ergo, this Honorable Court does have the jurisdiction, both in power and procedure, to generally abolish the doctrine of Sovereign immunity as it relates to the District of Columbia.

Accordingly, Appellant respectfully requests this Court to re-examine it's views expressed in Urow, supra. For it is indubitably clear that the general abolition of the governmental immunity doctrine is surely a burden to be borne by the Judiciary.

IV.

THE TRIAL COURT ERRED IN RULING THAT APPELLANT'S SUIT WAS BARRED UNDER THE DOCTRINE OF GOVERNMENTAL IMMUNITY

If the argument is to be accepted that operation of a police Department consist of acts ministerial in nature and are therefore outside the scope of Governmental Immunity. If the argument is accepted that the governmental immunity doctrine being a creature of the common laws, does not encompass the general adaptation of the common law in existence prior to the signing of our American Declaration of Independence and is therefore not considered a valid common law defense ; and

finally, if it is to be legally assumed as clear and cogent law, that the general abolition of the Doctrine is a burden to be borne by the Judiciary as an fact of a judicial functions rather than legislature rule making, the conclusion is clearly inescapable that ;

The Trial Court erred in ruling that Appellant's suit was barred under the Doctrine of Sovereign or Governmental Immunity.

Accordingly, Appellant respectfully prays this Honorable Court to Reverse the Judgement of the District Court entered herein.

Respectfully Submitted

s/ Clement Theodore Cooper

Clement Theodore Cooper
918 F Street, N.W. ( 300-302 )
Washington, D.C. 20004

Attorney for Appellants

# JOINT APPENDIX

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

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No. 23298

---

ROBERT GRAHAM, Et Al.

Appellants

vs.

DISTRICT OF COLUMBIA,

Appellee

---

Appeal from the United States District Court for the District of Columbia.

---

CLEMENT THEODORE COOPER
918 F Street, N.W.
Suite 300-302
Washington, D.C. 20004

Attorney for Appellants

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J.A. #1

September 23, 1965

TO: Board of Commissioners
District Building
14th & E Street N. W.
Washington, D. C.

RE: Notice of Claim for Damages
Due to Personal Injury.
ROBERT GRAHAM

Dear Sirs:

Please take notice that in accordance with the provisions of Chapter 9, Section 1-902 of the Codified Claims of this city, Robert Graham hereby presents you with his claim for damages against the city with the information required to be given under said section as follows:

1. That the injury for which I claim damages against the city occurred on April 11, 1965.

2. The place of injury was Number 9 Precint, Metropolitan Police Department.

3. The cause and manner of such injury and facts connected therewith are as follows: While claimant was being held in a cell at Number 9 Precint, on charges of drunkeness, and was being held long after the fine was paid, claimant was severely and brutally attached by another male person being held in the same cell block. Even though claimant screamed many times to attract attention of one of the officers, no one appeared, and as a result of such attach, claimant's right ear was bitten off completely, 3 ribs were fractured, claimant's left hand was injured and several days subsequent thereto, claimant developed a severe case of pneumonia.

4. There were at least five other persons in the cell at the time of the injury. Their names are not available at this time.

5. The amount of damages claimed by reason of such injury is $250.00, however, for purposes of this claim at this stage, and due to the limited authority of the Board of Commissioners, $10,000.

Robert Graham

ROBERT GRAHAM
1008 Maryland Ave. N. E.
Washington, D. C.

Clement Theodore Cooper
Attorney for Claimant

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.A. #2

ROBERT GRAHAM, 1
1008 Maryland Avenue, N.E.
Washington, D.C.

&

SUSIE GRAHAM, 2
1008 Maryland Avenue, N.E.
Washington, D.C.

Plaintiffs

vs.

DISTRICT OF COLUMBIA, 1
A Municipal Corporation
District Building
Washington, D.C.

&

CAPT. ROBERT S. SHUTTLEWORTH
Number 9 Precinct
Metropolitan Police Department
Washington, D.C.

Defendants

Civil Action No. 663-67

COMPLAINT FOR DAMAGES
PERSONAL INJURY - NEGLIGENCE

1. Jurisdiction is grounded on title I, section 102, D.C. Code, 1961 Edition, and the amount in controversy exceeds the sum of $10,000, exclusive of interests and costs.

2. Plaintiffs are adult citizens of the United States and are residents of the District of Columbia. The Defendant 1 is a Municipal Corporation, under whose jurisdiction and control, Defendant 2 is responsible as it's agent.

3. That at all times herein mentioned the defendant 1, the District of Columbia, was, and is now, a municipal corporation, organized and existing under and by virtue of the laws of Congress.

4. That on September 23, 1965, plaintiffs, by and through their attorney, duly presented to the Board of Commissioners of [illegible] their claim in writing for damages resulting from I was a prisoner at Number 9 Precinct of the Metropolitan Police Department. That in such claim presented, plaintiffs stated their names, addresses, the time, place and cause of the accident, and the nature and extent of plaintiff's injuries, which claim was

presented within six months from the date of said injuries. A copy of said claim as presented to the Board of City Commissioners is attached hereto, and by reference made a part hereof.

5. That said Board of City Commissioners has neglected or either refused to allow or reject said claim within 18 months after the filing of notice with said City.

6. That on or about April 11, 1965, plaintiff 1 was wrongfully arrested for drunkeness and was thereupon taken to Number 9 precinct where he was placed in a crowded cell with a number of other prisoners. That plaintiff 2 has paid fine for plaintiff 1's release but plaintiff was still held at said precinct. About 20 minutes after plaintiff 1 was placed in the cell block at Number 9 precinct, plaintiff was severely and brutally attacked by one of the cell mates, for no reason. Plaintiff 1 yelled on numerous occassions for an officer to come into the cell block but no one appeared. Plaintiff's yelling went ignored. Plaintiff 1 was thereupon continuously attacked, was thrown to the floor, his right ear lobe was completely bitten off and was kicked continuously and viciously until plaintiff 1 was rendered unconscious and suffered multiple rib fractures (7th,8th, and 9th ribs on the right side), Multiple contusions and abrasions, and contusions of the kidney.

7. Plaintiff was exercising due care for his own safety, under the circumstances, and was in no way contributorily negligent.

8. The defendants were negligent in that, (1) plaintiff was placed in a crowded cell, (2) plaintiff was not drunk at the time of his arrest therefore plaintiff was wrongfully arrested, (3) Failure to patrol the cell at reasonable times, (4) failure to appear in the cell block to prevent further attacks by inmates on plaintiff (5) gross failure in exercising proper supervision and police department, Number 9 Precinct.

9. The defendant knew or should have known of the potential danger in placing plaintiff in a crowded cell block with other persons or prisoners of despicable character.and thus, created the risk.

WHEREFORE, Plaintiff 1 prays judgment against the defendants in the sum of $200,000.00.

COUNT II

1. Plaintiff 2 repeats each and every allegation contained in Count I of the complaint as though fully recited at length and by reference incorporates the same herein and makes said allegations a part hereof.

2. Plaintiff 2, wife of plaintiff 1, alleges that as a result of the negligence of the defendants in failing to properly supervise and control prisoners charged to it's custody, particularly, plaintiff 1, her husband, plaintiff 2 suffered loss of services, society, sexual relationship, companionship, and loss of support as a result of the injuries sustained by her husband, plaintiff 1.

WHEREFORE, Plaintiff 2 prays judgment against the defendants in the sum of $50,000.00.

Clement Theodore Cooper
Attorney for Plaintiffs
918 F Street, N.W. (302)
Washington, D.C. 20004
Executive 3-3900

PLAINTIFFS DEMAND A TRIAL BY JURY ON ALL ISSUES

S.A. #3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT GRAHAM
1008 Maryland Avenue, N.E.
Washington, D.C.

and

SUSIE GRAHAM
1008 Maryland Avenue, N.E.
Washington, D.C.,

Plaintiffs

v.

Civil Action No. 663-67

DISTRICT OF COLUMBIA
a municipal corporation
District Building
Washington, D.C. 20004

and

Capt. ROBERT S. SHUTTLEWORTH
Number 9 Precinct
Metropolitan Police Department
Washington, D.C.,

Defendants.

ORDER

Upon consideration of the complaint filed herein, the answer thereto, the pre-trial order filed herein, oral motion of the defendant District of Columbia to dismiss the complaint after this action was called for jury trial, the oral opposition of plaintiffs thereto, the representation of counsel for plaintiffs that the suit against Robert S. Shuttleworth should be dismissed on the ground that he was not on the scene at the time of the incident giving rise to this civil action, it is, by the Court, this 2nd day of

2. That upon consent of the parties the complaint against Robert S. Shuttleworth be, and the same is, hereby dismissed.

UNITED STATES DISTRICT JUDGE

I hereby certify that a copy of the foregoing Order was mailed, postage prepaid, to Clement Theodore Cooper, Esq., Attorney for Plaintiffs, 918 F Street, N. W. Washington, D.C. 20004, this 11 day of June, 1969.

Assistant Corporation Counsel,D.C.
Attorney for Defendants
District Building
Washington, D.C. 20004

S.A. #3

CLERK'S OFFICE
United States District Court for the District of Columbia

Graham, et al
(Plaintiff)

vs.

D.C., et al
(Defendant)

Civil Action No. 663-67

There was entered on the docket June 23, 19 69

an order (judgment) dismissing the complaint.
Holtzoff, J.

[redacted] CLERK

NOTICE OF APPEAL. 73 (B)

S.A.#4

# United States District Court for the District of Columbia

JUN 25 19[illegible]

ROBERT GRAHAM, Et A'
*Plaintiff.*

*vs.*

DISTRICT OF COLUMBIA
*Defendant.*

CIVIL No. [illegible]-67

## NOTICE OF APPEAL

Notice is hereby given this 25th day of June, 1967, that ROBERT GRAHAM, plaintiff in the above entitled cause hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of June, 196[illegible] in favor of District of Columbia against said Robert Graham, plaintiff herein.

Clement Theodore Cooper
*Attorney for Plaintiff*

[illegible] F Street, N.W. ([illegible])

Washington, D.C. [illegible]
EXecutive [illegible]

CERTIFICATE OF SERVICE

Copy of the foregoing mailed to Corporation Counsel's Office, District Building, 14th & E Streets, N.W., Washington, D.C., this _____ day of June, 196[illegible].

CLEMENT THEODORE COOPER
Attorney for Plaintiff

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

---

No. 23298

---

ROBERT GRAHAM, Et Al.

Appellants

vs.

DISTRICT OF COLUMBIA

Appellee

---

Appeal from the United States District Court for the District of Columbia.

---

CERTIFICATE OF SERVICE

Copy of the foregoing Brief, mailed, postage prepaid to Corporation Counsel's Office, District Building, 14th & E Streets, N.W., Washington, D.C. 20004, this _____ day of _____, 1969.

s/ Clement Theodore Cooper

Clement Theodore Cooper
Attorney for Appellants
918 F Street, N.W. (300-302)
Washington, D.C. 20004

BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 23,298

ROBERT GRAHAM, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 3 1968

Nathan J. Paulson
CLERK

# I N D E X

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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

---

No. 23,298

---

ROBERT GRAHAM, et al.,

Appellants,

v.

DISTRICT OF COLUMBIA,

Appellee.

---

Appeal From The United States District Court
For The District Of Columbia

---

# BRIEF FOR APPELLEE

---

## REFERENCES TO RULINGS

The opinion of the District Court dismissing the complaint against the District of Columbia is not reported but is contained in the transcript of the proceedings at pp. 1-15.

This case has not been before the Court on any prior occasion.

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

Does this Court's decision in Spencer v. General Hospital of the District of Columbia, infra, alter the rule heretofore declared by this Court in Capital Transit Co. v. District of Columbia, infra, and Wilson v. Bittinger, infra, that the District of Columbia is immune from liability for torts committed by its officers while engaged in the operation and maintenance of the police department?

## COUNTER-STATEMENT OF THE CASE

On March 20, 1967, appellants, Mr and Mrs. Robert Graham, filed in the United States District Court for the District of Columbia, a civil action seeking damages for personal injuries suffered by Mr. Graham and loss of consortium by Mrs. Graham. Named as defendants were the District of Columbia and Captain S. Shuttleworth, an officer of the Metropolitan Police Department (J. A. 2).

In their complaint, appellants allege that, on April 11, 1965, Mr. Graham was arrested for drunkenness and taken to the Ninth Precinct Stationhouse, where he was placed in a crowded cell with a number of other prisoners. It was further alleged that, shortly after his incarceration, he was "severely and brutally attacked by one of the cell mates for no reason." (J. A. 2.)

Appellants contend, inter alia, that the appellees were negligent in placing Mr. Graham in a crowded cell, in failing to patrol the cell at reasonable intervals, and in failing to respond to his cries for help after the commencement of the attack (J. A. 2).

Following a hearing on June 16, 1969 (just prior to the time trial was scheduled to begin), the complaint was dismissed against Captain Shuttleworth with the consent of all parties. Upon the District's oral motion, asserted on the ground that the District was immune from suit because operation and maintenance of the police department is a "governmental function," the complaint against the District was also dismissed. (Tr. 1-16.)

This appeal followed (J. A. 4).

## ARGUMENT

### The trial court properly dismissed the complaint against the District of Columbia.

On November 10, 1969, this Court, en banc, in deciding Spencer v. General Hospital of the District of Columbia, ____ U. S. App. D. C. ____, ____ F. 2d ____ (No. 21,483), substantially modified the rule with respect to the District's immunity from liability for torts committed by its officers and employees. It specifically overruled its earlier decision in Calomeris v. District of Columbia, 96 U. S. App.

D. C. 364, 226 F. 2d 266 (1955), in which it had previously held that, in the operation and maintenance of a municipal hospital, the District was immune from liability for negligence.

However, in the case at bar, the trial court dismissed the complaint against the District of Columbia on the ground that, in the operation and maintenance of the police department, the District is immune from liability for its negligence. The trial court's judgment is persuasively supported by this Court's earlier decisions in Capital Transit Co. v. District of Columbia, 96 U. S. App. D. C. 199, 225 F. 2d 38 (1955) and Wilson v. Bittinger, 104 U. S. App. D. C. 403, 262 F. 2d 714 (1958), both of which hold that the District is not liable for its acts of negligence in the operation and maintenance of the police department. This Court, in Spencer, did not specifically overrule either of these decisions.

Assuming, arguendo, however, that the holding of Spencer, supra, is applicable to the operation and maintenance of the police department, as well as to the operation and maintenance of a municipal hospital, the negligent acts alleged in the complaint were "discretionary," acts for which the District is not liable to respond in damages. Elgin v. District of Columbia, 119 U. S. App. D. C. 116, 337 F. 2d 152 (1964).

The gravamen of the complaint is that police officials negligently failed to patrol the crowded cell block "at reasonable times." Determination as to when to patrol, or how frequently to patrol, plainly involves a discretionary function. Cf. Tucker v. Duke, 107 U. S. App. D. C. 253, 276 F. 2d 479 (1960).

## CONCLUSION

Upon the foregoing, it is respectfully submitted that the action of the trial court in dismissing the complaint was proper and should, therefore, be affirmed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

TED D. KUEMMERLING,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellee,
District Building,
Washington, D. C. 20004